1-11-2017

State v. Folk Respondent's Brief Dckt. 43790

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 43790**
Plaintiff-Respondent,	)	
	)	**Bonneville County Case No.**
v.	)	**CR-2008-332**
	)	
JONATHON EARL FOLK,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

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STATEMENT OF THE CASE

Nature Of The Case

Jonathon Earl Folk appeals from his conviction for sexual abuse of a child.

Statement Of The Facts And Course Of The Proceedings

The factual and procedural background of the case was set forth by the Court in the first appeal of this case:

> On December 25, 2007, at about 5:30 p.m., the mother of three minor children (Mother) arrived home after running an errand and went into the kitchen to help her grandmother finish preparing Christmas dinner. As she was walking to the kitchen, Jonathan Folk (Defendant) was in the living room. He had come over to pick up a house guest. After about ten to fifteen minutes, Mother walked into the living room and asked her husband where their five-year-old son (Child) was. He said that he thought Child was in his bedroom. Mother walked to Child's room, and as she was nearing the open door to the room she heard Child say, "That's gross." As she walked into the room, she saw Child lying on his back on the bed and Defendant kneeling down in front of Child with Child's legs around Defendant and his hands on Child's hips. The bed was a small child's bed, about ten inches off the floor. Mother asked what they were doing, and both Child and Defendant said they were just playing. Both Defendant and Child were fully clothed, and it did not appear that either of them had just pulled or zipped their pants up. Mother did not see any signs of any type of sexual act by Defendant. Defendant stood up and walked out of Child's room, and then returned and sat on the floor while Child picked up his toys pursuant to Mother's instructions. Defendant and the guest left about one and one-half hours later. At about 4:00 a.m. that night, Child awakened Mother and stated that he had just had a nightmare. Mother asked what it was about, and Child responded that it was about what that guy did to Child last night. Mother asked what guy, but Child would not answer. Later that morning, Mother telephoned the police and then asked Child what had happened last night. Child answered that Defendant had placed his mouth on Child's penis.
>
> On January 9, 2008, the State filed a complaint charging Defendant with lewd conduct by committing oral-to-genital contact with Child.

State v. Folk, 151 Idaho 327, 331, 256 P.3d 735, 739 (2011). Folk was convicted after a jury trial. Id. In the first appeal the Court concluded that Folk's rights to a speedy trial were not violated, id. at 331-36, 256 P.3d at 739-44; his right to confrontation was violated, id. at 336-39, 256 P.3d at 744-47; his right to self-representation was infringed, id. at 339, 256 P.3d at 747; and found error in the jury instructions for allowing convictions for uncharged conduct or conduct that did not constitute lewd conduct with a child, id. at 339-42, 256 P.3d at 747-50.

The case was re-tried, and Folk again convicted. State v. Folk, 157 Idaho 869, 873, 341 P.3d 586, 590 (Ct. App. 2014). The Idaho Court of Appeals reversed, holding that evidence of the victim's statements was properly admitted through the mother, but evidence of prior convictions was improperly admitted under I.R.E. 404(b). Id. at 873-80, 341 P.3d at 590-97. On remand, the state amended the charge from lewd conduct to sexual abuse of a child with a persistent violator enhancement. (R., pp. 591-92, 673-74.) The jury on the second re-trial convicted Folk of sexual abuse of a child, the district court dismissed the persistent violator enhancement and imposed a fixed sentence of 25 years, and Folk timely appealed. (R., pp. 801-16, 842-53.)

ISSUES

Folk presents seven issues on appeal. (Appellant's brief, p. 24.) Due to their number and length the state does not reproduce them here. The state rephrases the issues as:

1. Has Folk failed to show error in the admission of evidence of his statement of intent to sexually molest children?

2. Has Folk failed to show error in the admission of evidence that he put his mouth on the victim's penis in the course of sexually abusing him by tickling him and grabbing his hips, as evidence of Folk's sexual intent?

3. Has Folk failed to show the district erred by holding that extrinsic evidence of a prior statement was not admissible where the victim admitted making the prior statement?

4. Does Folk's argument that the district court erred by admitting detective Galbreaith's testimony fail because Folk has not addressed the ruling actually made by the district court?

5. Has Folk failed to show that the evidence is inadequate to support his conviction?

6. Has Folk failed to show fundamental error in the prosecutor's closing argument that Folk had not impeached testimony about his statement of future intent to sexually abuse children?

7. Has Folk failed to show fundamental error in the prosecutor's rebuttal to Folk's argument regarding why he did not want to be cross-examined?

8. Has Folk has failed to show cumulative error?

ARGUMENT

I.
Folk Has Failed To Show Error In The Admission Of Evidence Of His Statement Of Intent To Sexually Molest Children

A. Introduction

Prior to the second re-trial Folk filed a motion to exclude the testimony of Blaine Blair. (R., pp. 165-99.) At the first two trials Blair, a housemate of Folk at the time of the charged offense, testified that Folk told him he did not want to stop sexually abusing children. (R., pp. 348, 351-52.) The state acknowledged that the evidence was not admissible to prove past sexual abuse, but argued it was admissible to prove the future sexual abuse charged in this case. (R., pp. 351-56.) Although the state's primary argument was that evidence Folk stated he did not want to stop sexually abusing children was itself admissible, the state also posited that the prejudice of the implicit admission of past sexual abuse in Folk's statement could be eliminated by use of a leading question to ask Blair only whether Folk expressed a desire to sexually abuse children. (R., pp. 356-57.) The district court provisionally held that the evidence was admissible to prove sexual intent and negate innocent intent, such as horseplay. (R., pp. 491-95.)

The state filed a motion in limine to clarify whether it could use Blair's testimony in its case-in-chief, again suggesting that a carefully worded question could avoid any testimony regarding any admission to prior sexual abuse. (R., pp. 556-59; 8/3/15 Tr., p. 71, L. 13 – p. 73, L. 2.) The district court granted the motion, finding the testimony admissible to prove sexual intent if introduced

without any reference to prior sexual abuse. (R., pp. 687, 693-95; 08/20/15 Tr., p. 8, L. 12 – p. 9, L. 11; Trial Tr., vol. 1, p. 21, L. 22 - p. 25, L. 3.) At trial the following exchange occurred:

> Q Did you and Jonathon [Folk] ever discuss things? Yes or no?
>
> A Yes.
>
> Q Okay. Did you and Jonathon ever share secrets with one another? Yes or no?
>
> A Yes.
>
> Q Now again, this is yes or no. Did the defendant, Jonathon Folk, ever say anything to you indicating that he desired to sexually abuse children? Yes or no?
>
> A Yes.
>
> Q How many times did he express that to you?
>
> A Just once.

(Trial Tr., vol. 2, p. 596, L. 15 – p. 597, L. 3.)

Folk asserts that the district court erred because his statement of his desire to sexually abuse children is either irrelevant or its probative value is substantially outweighed by unfair prejudice. (Appellant's brief, pp. 25-30.) Application of the law to the record, however, shows that Folk has failed to show error.

B. Standard Of Review

"The decision whether to admit evidence at trial is generally within the province of the trial court." State v. Healy, 151 Idaho 734, 736, 264 P.3d 75, 77 (Ct. App. 2011). Relevance is a question of law reviewed de novo whereas the

weighing process under I.R.E. 403 is reviewed for an abuse of discretion. State v. Johnson, 148 Idaho 664, 666, 227 P.3d 918, 920 (2010).

C. Evidence Of Folk's Statement Of Desire To Sexually Molest Children Was Relevant And Its Probative Value Was Not Substantially Outweighed By Any Potential Prejudice

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401. See also State v. Hocker, 115 Idaho 544, 547, 768 P.2d 807, 810 (Ct. App. 1989). Irrelevant evidence is inadmissible, but relevant evidence "is admissible except as otherwise provided by these rules." I.R.E. 402. "Whether a fact is material is determined by its relationship to the legal theories presented by the parties." State v. Stevens, 146 Idaho 139, 143, 191 P.3d 217, 221 (2008) (citation omitted).

The state charged Folk with "tickling" the victim's stomach or feet or "touching" the victim's hips "with the intent to gratify his lust, passions, or sexual desires." (R., p. 673.) The evidence that Folk expressed a desire to sexually abuse children made the state's theory that Folk had sexual intent when he touched or tickled the victim's stomach, feet or hips more probable than it would be without the evidence. Under the applicable legal standards the evidence of Folk's statement that he desired to sexually abuse children was relevant.

Folk contends his statement was too vague to make his sexual intent more likely. He argues that because tickling or touching a victim's stomach, feet or hips is not commonly considered sexual abuse, the jury could not infer from

his general statement of desire to sexually abuse children that he would have sexual intent when he tickled or touched this particular child's stomach, feet or hips. (Appellant's brief, p. 26.) This analysis is flawed because the evidence of Folk's generalized statement of intent to sexually abuse children puts his actions of touching a child once he was alone with that child in a context that makes his sexual intent more probable. Folk's expression of a generalized desire to sexually abuse children makes it more probable that his touching a child, and the acts leading up to that touching such as securing an opportunity to be alone with that child, was not innocent, but was rather done with sexual motive or desire.

Nor did the district court abuse its discretion when it concluded that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Pursuant to I.R.E. 403, relevant evidence may be excluded if, in the district court's discretion, the danger of unfair prejudice—which is the tendency to suggest a decision on an improper basis—substantially outweighs the probative value of the evidence. State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010); State v. Floyd, 125 Idaho 651, 654, 873 P.2d 905, 908 (Ct. App. 1994); State v. Nichols, 124 Idaho 651, 656, 862 P.2d 343, 348 (Ct. App. 1993).

Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party's case. See State v. Leavitt, 116 Idaho 285, 290, 775 P.2d 599, 604 (1989) ("Certainly that evidence was prejudicial to the defendant, however, almost all evidence in a criminal trial is demonstrably admitted to prove the case of the state, and thus results in prejudice to a defendant."). Rather, the rule protects only against evidence that

is unfairly prejudicial, that is, evidence that tends to suggest a decision on an improper basis. Floyd, 125 Idaho at 654, 873 P.2d at 908. As previously explained by the Idaho Supreme Court: "Under the rule, the evidence is only excluded if the probative value is *substantially* outweighed by the danger of unfair prejudice. The rule suggests a strong preference for admissibility of relevant evidence." State v. Martin, 118 Idaho 334, 340 n.3, 796 P.2d 1007, 1013 n.3 (1990) (emphasis in original).

The district court concluded the evidence of Folk's statement of desire to sexually abuse children was "highly relevant to the issues of motive, intent, or absence of mistake or accident," "probative of Folk's state of mind," and "gives an explanation as to why he would place himself alone with a child or touch a child." (R., pp. 694-95 (internal quotations omitted).) The only unfair prejudice identified by the district court was the inference of past sexual abuse of children, which the district court eliminated by requiring the presentation of only evidence of a statement of future intent or motive. (R., p. 695.)

By eliminating evidence of past sexual abuse of children, the evidence was effectively removed from the scope of I.R.E. 403 and 404(b). The latter rule applies to "[e]vidence of other crimes, wrongs, or acts" admitted to prove "character in order to show that the person acted in conformity therewith." I.R.E. 404(b). "The term 'acts' or the phrase 'other acts' does not encompass every fact in the case as opposed to the facts relating to the [charged crime] itself." State v. Sams, ___ Idaho ___, 382 P.3d 366, 368 (Ct. App. 2016). Rather, the rule "is principally designed to protect against admission of purely

propensity evidence." Id. at ___, 382 P.3d at 368–69. Once the inference of previous sexual abuse of children was removed, the evidence of Folk's statement no longer contained a "crime, wrong or act" to which the rule applied.[1] Rule 404(b) was therefore no longer a viable ground for excluding the evidence. Likewise, the evidence was not unfairly prejudicial under I.R.E. 403 because it no longer carried the potential to invite the jury to decide the case on an improper basis. The district court did not abuse its discretion when it concluded that any potentially unfair prejudice did not substantially outweigh the evidence's probative value.

On appeal Folk contends that the probative value of the testimony was "extremely low" because Blair's memory was "disastrous" and he had purportedly made a conflicting statement to a police officer. (Appellant's brief, pp. 26-27.) However, the measurement of probative value of evidence is its effect "if believed by the jury." State v. Parmer, 147 Idaho 210, 216, 207 P.3d 186, 192 (Ct. App. 2009). See also State v. Salazar, 153 Idaho 24, 27-28, 278 P.3d 426, 429-30 (Ct. App. 2012) (argument that identification evidence could have led to misidentification not proper basis for exclusion under I.R.E. 403); State v. Arledge, 119 Idaho 584, 588, 808 P.2d 1329, 1333 (Ct. App. 1991) (applying "if believed" standard); State v. Fenley, 103 Idaho 199, 202, 646 P.2d 441, 444 (Ct. App. 1982) (applying "if believed" standard). A witness's testimony is not

[1] Even if the words themselves could be deemed "acts" under I.R.E. 404(b), the words, as presented to the jury, were entirely an expression of motive or intent, proof of which is specifically allowable under the rule. I.R.E. 404(b). To the extent a specific statement of motive can be considered evidence of character, the district court did not abuse its discretion by finding the probative value not substantially outweighed by the potential for unfair prejudice.

rendered irrelevant just because a party claims the witness is unreliable (a determination that is the province of the jury). Folk has failed to show error in the district court's determination that the evidence was "highly relevant." (R., pp. 694-95.)

Folk next argues that the evidence was prejudicial because he could not impeach it without making the jury aware of the entire statement with its implication that he had sexually abused children before. (Appellant's brief, pp. 27-29.) The legal standard for unfair prejudice, however, is the tendency of the evidence to suggest a decision on an improper basis. Floyd, 125 Idaho at 654, 873 P.2d at 908. Folk's argument, that he could not effectively impeach the admitted evidence without the jury learning of excluded prejudicial evidence,[2] does not articulate how the evidence might suggest a decision on an improper basis. That Folk concluded that evidence of the entirety of his statement was more prejudicial than helpful to his defense, and therefore chose not to admit the entire statement, does not show any prejudice relevant to the I.R.E. 403 analysis.

Evidence of Folk's statement that he did not want to stop sexually abusing children contained both a retrospective acknowledgement of prior sexual abuse of children and a prospective statement of intent to sexually abuse children. By preventing admission of the retrospective acknowledgement of prior sexual abuse of children while admitting evidence of the prospective statement of intent to sexually abuse children, the district court eliminated the potential for unfair

[2] Folk does not articulate how admitting evidence of the entirety of his statement would have impeached Blair.

prejudice. Even if some potential for unfair prejudice remained, the district court did not abuse its discretion in admitting the evidence of future intent.

II.
Folk Has Shown No Error In The Admission Of Evidence That He Orally Copulated The Child In The Course Of Conduct That Included His Crime Of Sexual Touching

A. Introduction

Folk moved to exclude evidence that he put his mouth on the child's penis in the course of sexually abusing the child, asserting that the state, by amending the charge to sexual abuse by touching the child's stomach, feet or hips had "abandoned its right to present testimony related to this allegation." (R., pp. 615-19.) The district court denied this motion, concluding that the evidence was not "unfairly prejudicial." (R., pp. 688-89.) Recognizing that its analysis would be different if the oral copulation had happened at an earlier or later date than the charged sexual touching, the court stated, "Because of the contemporary nature of the acts involved, [the evidence of oral copulation of the child] is directly related to the charged conduct." (R., p. 689; see also 8/20/15 Tr., p. 6, Ls. 1-4 (charged and uncharged actions were "proximate in time," "contemporary" and "closely associated").) Citing the "complete story principle," the district court stated that "[a]llowing the jury to know exactly what happened at the time of the alleged incident will not result in unfair prejudice to Folk." (R., p. 689; see also 8/20/15 Tr., p. 5, L. 13 – p. 6, L. 9.)

On appeal Folk argues the district court erred, reasoning that even if he did have sexual intent when he put his mouth on the child's penis, that does not

make it more probable that he had sexual intent when he touched and tickled the child in the same course of conduct, and any inference that it does is unfairly prejudicial. (Appellant's brief, pp. 30-37.) Application of relevant legal standards shows no error in the admission of the evidence.

B. Standard Of Review

Relevance is a question of law reviewed de novo whereas the weighing process under I.R.E. 403 is reviewed for an abuse of discretion. State v. Johnson, 148 Idaho 664, 666, 227 P.3d 918, 920 (2010).

C. Folk Has Shown No Error In The Admission Of Evidence That His Course Of Conduct Included Putting His Mouth On The Victim's Penis

As set forth above in more detail, evidence is relevant if it has "any tendency" to prove a fact of consequence and relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. I.R.E. 401, 403. The fact of consequence relevant to this issue is whether Folk's touching of the child's stomach, hips or feet was accomplished "with the intent to gratify [his] lust, passions, or sexual desire." I.C. § 18-1506(1). Application of the relevant legal analysis shows the evidence that Folk's course of conduct resulted in oral copulation was admissible to show sexual intent at different stages of the course of conduct.

"[A]ll facts inseparably connected to the chain of events of which the act charged in the information is a part are admissible even though the full story shows the commission of other crimes." State v. Izatt, 96 Idaho 667, 670, 534 P.2d 1107, 1110 (1975) (internal quotes and citations omitted) quoted in

State v. Blackstead, 126 Idaho 14, 18, 878 P.2d 188, 192 (Ct. App. 1994). "[T]he state is entitled to present to the jury a complete account of the circumstances surrounding the commission of a crime." State v. Buzzard, 110 Idaho 800, 802, 718 P.2d 1238, 1240 (Ct. App. 1986). The complete story principle "is an independent basis of admission when the uncharged crimes are so inseparably connected to the charged crime that a complete account of the charged crime cannot be given without also detailing the uncharged crime." State v. Roach, 109 Idaho 973, 976, 712 P.2d 674, 677 (Ct. App. 1985).

The district court applied the correct legal standards. (R., pp. 688-89.) It reasoned that evidence showing that Folk's course of conduct included Folk putting his mouth on the penis of the victim was evidence tending to show that Folk's intent to gratify his lust, passions, or sexual desire was present throughout, including the charged touching. (Id.; 8/20/15 Tr., p. 5, L. 13 – p. 6, L. 9.) The district court correctly concluded that evidence showing that Folk's course of conduct culminated in a completed sexual act would provide the complete story applicable to Folk's interaction with the victim and tended to show Folk's sexual motivation throughout that course of conduct.

Folk argues the district court erred in finding the evidence relevant because evidence of oral copulation was not evidence of grooming nor was it "probative of a continuing criminal design." (Appellant's brief, p. 35.) This argument does not withstand scrutiny. That Folk's course of conduct culminated in an overtly sexual act is evidence that he intended his course of conduct to culminate in a sexual act. If he intended his conduct to culminate in a sexual act

it is more likely he acted with sexual intent throughout. That he acted with sexual intent throughout makes it more likely that the tickling and touching that led up to the overtly sexual act was done "with the intent to gratify [his] lust, passions, or sexual desire." I.C. § 18-1506(1). Folk's denials notwithstanding, the jury could easily conclude that Folk's intent to gratify his lust, passions or sexual desire did not start the moment his lips touched his victim's penis, but instead that the touching and tickling was, to Folk, a form of foreplay or sexual touching from which Folk received sexual gratification. Folk has failed to show that evidence of an overtly sexual act within a course of conduct is not relevant to show that other acts in the same course of conduct, which are not overtly sexual, were nevertheless committed with sexual intent.

Folk also argues that the potential for unfair prejudice substantially outweighed the probative value of the evidence. As set forth above, a person whose tickling and touching of a child culminates in an overtly sexual act is much more likely acting to gratify lusts, passions or sexual desire than a person whose tickling and touching results in no such overtly sexual conduct. The prejudice identified by Folk is that the jury could become confused and convict him for the oral copulation rather than for the charged acts of tickling and touching of the child's stomach, feet and hips. (Appellant's brief, p. 37.) The record, however, establishes no such possibility of confusion as claimed by Folk.

A variance can occur where the jury instructions given at trial allow the jury to convict the defendant of the charged crime on one or more alternative theories than alleged in the charging document. See State v. Windsor,

110 Idaho 410, 716 P.2d 1182 (1985); State v. Montoya, 140 Idaho 160, 166, 90 P.3d 910, 916 (Ct. App. 2004). The jury instructions in this case, however, make it clear that the jury could convict only for "the act of tickling [the child's] stomach and/or feet, and or by the act of touching his hips." (R., p. 750.) Folk has not argued that the jury would or could have ignored this instruction and convicted him for uncharged conduct. On this record there was no possibility of jury confusion as to which acts it had to find guilt beyond a reasonable doubt for a conviction.

Folk also asserts the evidence is "inflammatory," but does not articulate why the evidence should be so characterized. (Appellant's brief, p. 37.) To the extent the evidence is "inflammatory" because it strongly indicates sexual intent in the course of conduct, such is not unfairly prejudicial. "Evidence is not unfairly prejudicial simply because it is damaging to a defendant's case. Evidence is unfairly prejudicial when it suggests decision on an improper basis." State v. Fordyce, 151 Idaho 868, 870, 264 P.3d 975, 977 (Ct. App. 2011). To the extent Folk contends that the evidence is "inflammatory" in the sense that it shows character, the district court correctly applied the complete story principle and admitted the evidence to show motive, intent and lack of mistake. Folk has failed to show an abuse of discretion.

The evidence in this case showed that Folk engaged in a course of conduct that included tickling, touching and oral copulation of a child. Folk has failed to show error or an abuse of discretion in the district court's determination

the jury should have evidence of the entire course of conduct to evaluate Folk's intent when he engaged in the charged act of touching and tickling.

III.
The District Court Did Not Err By Holding That Extrinsic Evidence Of A Prior Statement Was Not Admissible Where The Victim Admitted Making The Prior Statement

A. Introduction

The district court several times sustained objections to efforts by Folk and his counsel to read a transcript of the victim's prior testimony to the victim during cross-examination. (Trial Tr., vol. 1, p. 428, L. 9 – p. 429, L. 13; p. 433, L. 2 – p. 434, L. 4; p. 451, L. 17 – p. 452, L. 12; p. 463, L. 22 – p. 468, L. 15; p. 477, Ls. 7-16; p. 481, L. 21 – p. 486, L. 14; p. 496, L. 2 – p. 497, L. 6; p. 500, L. 20 – p. 501, L. 16; p. 502, L. 21 – p. 503, L. 17; p. 504, L. 13 – p. 505, L. 8; p. 506, L. 9 – p. 507, L. 21.) The district court made clear that its rulings were based on I.R.E. 612, which addresses refreshment of recollection, and I.R.E. 613, which addresses impeachment with prior statements. (E.g., Trial Tr., vol. 1, p. 451, L. 17 – p. 452, L. 10; p. 467, L. 1 – p. 468, L. 15; p. 486, Ls. 6-14; p. 504, L. 25 – p. 505, L. 8; p. 507, Ls. 18-21.) In addressing Rule 613(b) the district court consistently stated, and ruled accordingly, that the proper process for impeachment with prior inconsistent statements was to confront the witness with the statement and, if he admits having made the statement, the impeachment is complete. (Trial Tr., vol. 1, p. 465, L. 4 – p. 468, L. 8 (if witness says he made the statement in the first trial, but does not remember it now, "then you've made your point and you have to go on"); p. 486, Ls. 6-14 ("If he denies it, then you can

submit extrinsic evidence. If he doesn't deny it, then you've made your point and you get to move on."); p. 504, L. 25 – p. 505, L. 8 (extrinsic evidence of prior inconsistent statement admissible only if witness denies making it); p. 507, Ls. 18-21 ("I think you need to ask him, did you previously testify to X, Y, and Z. And if he denies it—you confront him with what he said. If he denies it again, I'll let you present the transcript.").) The district court also let the jury consider all evidence of prior testimony as substantive evidence. (Tr., vol. 1, p. 535, L. 6 – p. 536, L. 19.)

On appeal Folk contends that the district court erred under I.R.E. 801(d)(1)(A), which defines when prior testimony is not hearsay, and I.R.E. 613, which governs impeachment with prior statements. (Appellant's brief, pp. 39-42.) The former argument is not preserved because the district court never ruled on a hearsay objection, and Folk does not claim fundamental error. The latter argument, that the district court erred under I.R.E. 613, is not supported by the law or the record.

B. Standard Of Review

"The trial court's judgment concerning admission of evidence shall only be disturbed on appeal when there has been a clear abuse of discretion." State v. Perry, 150 Idaho 209, 218, 245 P.3d 961, 970 (2010) (internal quotes omitted).

C. Folk's I.R.E. 801(d)(1)(A) Argument Is Not Preserved

It is well-established that an objection on one basis is insufficient to preserve an objection on a completely different basis. "For an objection to be

preserved for appellate review, the specific ground for the objection must be clearly stated." State v. Norton, 134 Idaho 875, 880, 11 P.3d 494, 499 (Ct. App. 2000) (citing I.R.E. 103(a)(1); State v. Gleason, 130 Idaho 586, 592, 944 P.2d 721, 727 (Ct. App. 1997)). "Objecting to the admission of evidence on one basis does not preserve a separate and different basis for exclusion of the evidence." Id. (citing State v. Higgins, 122 Idaho 590, 596, 836 P.2d 536, 542 (1992); Gleason, 130 Idaho at 592, 944 P.2d at 727). Application of this law to the record shows Folk's claims based on a hearsay argument are not preserved.

Folk argues that the "district court erred by not allowing Mr. Folk to introduce extrinsic evidence of [the victim's] prior sworn testimony." (Appellant's brief, p. 39.) He claims that the victim's "prior testimony" was "admissible non-hearsay" and "admissible for impeachment." (R., p. 42.) The authority he relies upon is I.R.E. 801(d)(1)(A), which addresses the definition of hearsay, and I.R.E. 613(b), which governs admission of extrinsic evidence . (Appellant's brief, p. 41.) Folk cites to vast swaths of transcript rather than identifying any particular objection or ruling. (Appellant's brief, p. 42.) Although his argument based on I.R.E. 613 is preserved because the district court made several rulings based on this rule, because Folk has failed to cite a single objection or ruling based on hearsay in general or I.R.E. 801(d)(1)(A) in specific, he has failed to establish that his argument based on I.R.E. 801(d)(1)(A) is preserved.[3]

[3] In addition, the district court stated at one point that its rulings to that point had been based on I.R.E. 612. (Trial Tr., vol. 1, p. 451, L. 17 – p. 452, L. 1.) Folk has not claimed on appeal that the district court misapplied Rule 612, and has therefore not challenged the district court's rulings under Rule 612. Only the district court's rulings based on I.R.E. 613 are preserved on this record.

D. Folk Has Shown No Error Under I.R.E. 613

"Under I.R.E. 613, inconsistent out-of-court statements may be used to impeach a witness' trial testimony." State v. Wood, 126 Idaho 241, 248, 880 P.2d 771, 778 (Ct. App. 1994). Extrinsic evidence of past inconsistent statements is admissible only if "the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded the opportunity to interrogate the witness thereon." I.R.E. 613. However, "even if all the foundational elements of Rule 613 are met, a district court is not unequivocally bound to admit any or all extrinsic evidence of a prior inconsistent statement." United States v. Young, 248 F.3d 260, 268 (4th Cir. 2001). "If a witness admits making prior inconsistent statements, there is no necessity for further proof, as by admission of the prior inconsistent written statements." United States v. Soundingsides, 820 F.2d 1232, 1241 (10th Cir. 1987). See also Rush v. Illinois Cent. R. Co., 399 F.3d 705, 723 (6th Cir. 2005) ("We long have held that when a witness admits to making a prior inconsistent statement, extrinsic proof of the statement is inadmissible.").[4]

[4] But see United States v. Wimberly, 60 F.3d 281, 286 (7th Cir. 1995) ("Prior inconsistent statements are admissible even though the witness admits making the prior inconsistency."). As indicated, the federal circuits are split as to whether impeachment with extrinsic evidence is allowed under Fed.R.Evid. 613(b) after the witness admits making the inconsistent statement. No Idaho precedent clearly interprets Idaho's equivalent rule, although the Idaho Supreme Court has stated that it "has not held, and the rule does not imply, that an *outright denial* of having made a prior statement is required in order for the prior statement to be used for impeachment purposes." State v. Koch, 157 Idaho 89, 104, 334 P.3d 280, 295 (2014) (emphasis added). The Idaho Courts have not addressed the issue of whether an admission of having made the statement completes impeachment.

The Idaho Supreme Court has articulated and applied the relevant legal standard as follows:

> This Court has not held, and the rule does not imply, that an outright denial of having made a prior statement is required in order for the prior statement to be used for impeachment purposes. *See* I.R.E 613. The question is whether the support Salina Koch showed in her testimony for her husband and her denial that he seemed to have had a close relationship with C.C. are inconsistent with Salina's prior statement that she had suspicions something was going on between C.C. and her husband.

State v. Koch, 157 Idaho 89, 104, 334 P.3d 280, 295 (2014). To answer the question of whether statements are inconsistent, the court should apply a standard "which 'allows the prior statement whenever a reasonable man could infer on comparing the whole effect of the two statements that they had been produced by inconsistent beliefs.'" Id. at 104, 334 P.3d at 295 (quoting United States v. Morgan*,* 555 F.2d 238, 242 (9th Cir.1977) (quoting 4 *Weinstein's Evidence,* Matthew Bender, 801–76–801–76.1 (1976)). The Court "declin[ed] to adopt a rigid definition that an inconsistency is only found when it is apparent on the face of two statements to the extent that it is the only possible inference to be drawn" because "[t]rial judges must retain a high degree of discretion in deciding the exact point at which a prior statement is sufficiently inconsistent with a witness's trial testimony to permit its use in evidence." Koch, 157 Idaho at 104, 334 P.3d at 295. Importantly, prior inconsistent statements "are not hearsay because *they are not offered for the truth of any of the facts asserted*, but rather, solely to impeach the credibility of the witness." Id. at 103, 334 P.3d at 294 (emphasis added). The Court ultimately affirmed the district court's ruling that allowed the state to call a detective to testify regarding statements made by a

witness (the defendant's wife) that were inconsistent with the witness's trial testimony after instructing the jury that the evidence was for impeachment only and not to be considered for the truth of the matters asserted. Id. at 103-04, 334 P.3d at 294-95.

As noted above, at several points in the victim's testimony in this case the district court held that the proper process for impeachment with prior inconsistent statements under I.R.E. 613 was to confront the witness with the statement and, if he admits having made the statement, the impeachment is complete. (Trial Tr., vol. 1, p. 465, L. 4 – p. 468, L. 8 (if witness says he made the statement in the first trial, but does not remember it now, "then you've made your point and you have to go on"); p. 486, Ls. 6-14 ("If he denies it, then you can submit extrinsic evidence. If he doesn't deny it, then you've made your point and you get to move on."); p. 504, L. 25 – p. 505, L. 8 (extrinsic evidence of prior inconsistent statement admissible only if witness denies making it).) This ruling is entirely consistent with the applicable law. The district court did not exceed its discretion by excluding (if in fact it did so) admission of extrinsic evidence establishing that the witness made a prior inconsistent statement where the fact that the witness made the statement was established by the witness's own admission.[5]

[5] Because the district court excluded extrinsic evidence of statements only where the witness admitted making the statement, any error was also harmless. "The inquiry is whether, beyond a reasonable doubt, a rational jury would have convicted [the defendant] even without the admission of the challenged evidence." State v. Johnson, 148 Idaho 664, 669, 227 P.3d 918, 923 (2010) (citing Chapman v. California, 386 U.S. 18, 24 (1967); Neder v. United States, 527 U.S. 1, 18 (1999)). Moreover, the district court specifically instructed the jury that it could consider evidence of prior testimony (but not unsworn interviews) as substantive evidence. (Tr., vol. 1, p. 535, L. 6 – p. 536, L. 19.) Because

Folk points out that a witness's denial of memory of having made a prior statement allows use of extrinsic evidence of the statement for impeachment. (Appellant's brief, pp. 41-42 (citing Pruess v. Thomson, 112 Idaho 169, 170-71, 730 P.2d 1089, 1090-91 (1986)). While this is generally true, it is also true that "[t]rial judges must retain a high degree of discretion in deciding the exact point at which a prior statement is sufficiently inconsistent with a witness's trial testimony to permit its use in evidence." Koch, 157 Idaho at 104, 334 P.3d at 295. Here the witness several times testified that he did not remember making statements in his prior testimony, *but always acknowledged that he had, in fact, made the statement in the transcript he was shown*. (E.g., Trial Tr., vol. 1, p. 469, L. 25 – p. 470, L. 5; p. 470, Ls. 19-24; p. 471, Ls. 9-25; p. 472, Ls. 4-13; p. 475, Ls. 1-4; p. 479, Ls. 10-17; p. 480, Ls. 8-12; p. 485, Ls. 9-25; p. 501, L. 17 – p. 502, L. 20; p. 507, L. 22 – p. 508, L. 1; p. 509, L. 25 – p. 510, L. 13.) The district court did not abuse its discretion when it concluded that the witness admitted having made the former statements. Furthermore, once the witness admitted making the statements and the jury was apprised of the content of the statement the court did not abuse its discretion in concluding that further impeachment with the statement would be beneficial. I.R.E. 403. Because the district court did not abuse its discretion, Folk has failed to show error.

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evidence of the substance of the prior testimony was before the jury, and the jury was allowed to consider the evidence substantively, any alleged error was harmless.

IV.
Folk's Argument That The District Court Erred By Admitting Detective Galbreaith's Testimony Fails Because He Has Not Addressed The Ruling Actually Made By The District Court

Folk cross-examined the victim about his interview with Detective Galbreaith. (Tr., vol. 1, p. 424, L. 3 – p. 427, L. 1; p. 472, L. 15 – p. 475, L. 9.) Included in that cross-examination was the following exchange:

> Q BY DEFENDANT FOLK: Do you remember saying—do you remember telling the detective that Jon—that he didn't actually touch me?
>
> A No.
>
> Q Would it help to refresh your memory if you looked at the transcript?
>
> A Maybe. I don't know.

(Tr., vol. 1, p. 424, Ls. 18-24.) At that point Folk moved to show the victim the transcript but there was apparently an issue with what transcript Folk was using, resolved by a sidebar, and Folk moved on to a different topic until later when everyone had the right transcript and he resumed his cross-examination about that interview. (Tr., vol. 1, p. 424, L. 25 – p. 427, L. 3; p. 472, L. 15 – p. 473, L. 10.) Folk then cross-examined the victim extensively based on statements in the transcript of the interview. (Tr., vol. 1, p. 473, L. 11 – p. 479, L. 9.) In re-direct examination the victim again testified that he did not recall whether he had told the detective that Folk touched him or not. (Tr., vol. 1, p. 517, L. 12 – p. 518, L. 8.)

When Detective Galbreaith testified the prosecution asked him whether the victim had disclosed sexual abuse in the detective's interview. (Tr., vol. 2,

p. 627, Ls. 1-9.[6]) The defense asserted a hearsay objection, and the prosecutor argued the detective's testimony regarding the interview of the victim was admissible as a prior consistent statement. (Tr., vol. 2, p. 627, L. 10 – p. 630, L. 3.) The district court ultimately allowed limited testimony on the subject, but only for establishing credibility and not for the truth of the matter asserted. (Tr., vol. 2, p. 630, L. 4 – p. 631, L. 23; p. 634, L. 3 – p. 635, L. 3.) The prosecution then elicited testimony that during the interview the victim did disclose oral-genital contact by Folk. (Tr., vol. 2, p. 633, Ls. 9-25.)

Folk claims the district court admitted the evidence "to prove the truth of the matter asserted," and argues this was error because the evidence "was not offered to rebut an express or implied charge of recent fabrication." (Appellant's brief, pp. 44-45.) The record, however, shows that the district court did not admit the testimony regarding the detective's interview for the truth of matters asserted by the victim therein. The district court specifically admitted the testimony as it related to credibility and instructed the jury that it was not to consider the evidence for the truth of the matter asserted. (Tr., vol. 2, p. 630, Ls. 4-21; p. 631, Ls. 11-23; p. 634, L. 3 – p. 635, L. 2.) Because Folk's argument that the evidence was improperly admitted as substantive evidence is based on a false premise not supported by the record, and because he has failed to address the ruling actually made by the district court, Folk has failed to show error. See Andersen v. Prof'l Escrow Servs., Inc., 141 Idaho 743, 746, 118 P.3d 75, 78

[6] There appears to be a mistranscription or a misstatement because the transcript says "substance abuse" rather than "sexual abuse." (Tr., vol. 2, p. 627, Ls. 6-8.) In context, however, it is clear that the topic was sexual abuse.

(2005) ("When a decision is based upon alternative grounds, the fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the other grounds." (internal quotations and citation omitted)); La Bella Vita, LLC v. Shuler, 158 Idaho 799, 806, 353 P.3d 420, 427 (2015) (same).

Folk questioned the victim in a manner calculated to leave the impression that he had denied sexual touching in the interview with Detective Galbreaith. (Tr., vol. 1, p. 424, Ls. 18-24.) The district court allowed the state to present evidence of what was actually said in the interview to rebut that impression, but not for the truth of the matter asserted. (Tr., vol. 2, p. 630, L. 4 – p. 631, L. 23; p. 634, L. 3 – p. 635, L. 3.) Folk has not claimed that the actual ruling made by the district court was erroneous. (Appellant's brief, pp. 43-45.) He has therefore failed to show error.

V.
Folk Has Failed To Show That The Evidence Is Inadequate To Support His Conviction

A. Introduction

After the state rested the defense moved for acquittal, specifically arguing lack of evidence showing sexual intent. (Tr., vol. 2, p. 643, Ls. 13-14; p. 644, L. 22 – p. 645, L. 8.) The district court denied the motion, concluding the jury could find intent based on the inferences from evidence that Folk had stated a desire to sexually abuse children and the "circumstances" surrounding the touching. (Tr., p. 645, L. 16 – p. 649, L. 20.) Folk, reiterating his argument that

touching leading up to a sexual act is necessarily free of sexual intent, asserts the district court erred. Folk's argument lacks merit.

B. Standard Of Review

"Appellate review of the sufficiency of evidence is limited in scope." State v. Marsh, 153 Idaho 360, 365, 283 P.3d 107, 112 (Ct. App. 2011). An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Miller, 131 Idaho 288, 292, 955 P.2d 603, 607 (Ct. App. 1997); State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992). In conducting this review the appellate court will not substitute its view for that of the jury as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn from the evidence. Miller, 131 Idaho at 292, 955 P.2d at 607; State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991). Moreover, the facts, and inferences to be drawn from those facts, are construed in favor of upholding the jury's verdict. Miller, 131 Idaho at 292, 955 P.2d at 607; State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987).

C. The Evidence Is Sufficient To Show Folk's Sexual Intent

It is well-established, both in case law and in the Idaho Code, that intent may be inferred from the defendant's conduct or from circumstantial evidence. State v. Elias, 157 Idaho 511, 515, 337 P.3d 670, 674 (2014); State v. Reyes, 139 Idaho 502, 506, 80 P.3d 1103, 1107 (Ct. App. 2003); I.C. § 18-115. "'[E]ven

when circumstantial evidence could be interpreted consistently with a finding of innocence, it will be sufficient to uphold a guilty verdict when it also gives rise to reasonable inferences of guilt." State v. Abdullah, 158 Idaho 386, 430, 348 P.3d 1, 45 (2015) (brackets original) (quoting State v. Severson, 147 Idaho 694, 712, 215 P.3d 414, 432 (2009)).

At a family Christmas gathering, Folk spent time with five-year-old T.R. playing and giving him candy. (Tr., vol. 1, p. 407, Ls. 11-21; p. 410, Ls. 7-20; p. 412, Ls. 15-22; p. 414, Ls. 9-13.) He then invited T.R. into T.R.'s room with him to play. (Tr., vol. 1, p. 414, L. 14 – p. 415, L. 1.) In the room alone with T.R. Folk tickled and touched T.R. (Tr., vol. 1, p. 415, Ls. 2-10; p. 423, Ls. 16-24; Tr., vol. 2, p. 642, Ls. 8-18.) Then Folk pulled down T.R.'s pants and put his mouth on T.R.'s penis. (Tr., vol. 1, p. 415, Ls. 11-23.) Folk had also previously expressed a desire to sexually abuse children. (Trial Tr., vol. 2, p. 596, L. 15 – p. 597, L. 3.) Based on evidence regarding Folk's conduct and statements, the district court concluded there was sufficient evidence for the jury to find intent. (Tr., vol. 2, p. 646, Ls. 6-14.) Because the evidence creates a reasonable inference that Folk touched the five-year-old victim with the intent to gratify his lust, passions, or sexual desire, the district court properly denied the motion for acquittal.

On appeal Folk contends that the jury could not infer sexual intent from his statement and conduct. (Appellant's brief, pp. 46-49.) Folk does concede that the jury could have seen the pre-oral copulation touching as "a means to an end," but maintains that all touching done as a prelude to explicitly sexual contact is

done without sexual intent. (Appellant's brief, p. 49.) Because there is neither factual nor legal basis for claiming that sexual intent is associated only with contact with a sexual organ, this argument fails. The jury certainly had sufficient evidence to conclude that Folk touched T.R. with sexual intent during the course of conduct that culminated in him orally copulating the child.

VI.
Folk Has Failed To Show Fundamental Error In The Prosecutor's Closing Argument That Folk Had Not Impeached Testimony About His Statement Of Future Intent To Sexually Abuse Children

A. Introduction

In discussing Blaine Blair's testimony, and specifically the testimony that Folk told him he had a desire to sexually abuse children, the prosecutor argued in closing: "Mr. Folk had him on the stand, and he steered him pretty good on some other stuff. Didn't even ask him about that question. Didn't ask him a single thing. When was it supposed to happen? Just you know any sort of argument about that." (Tr., vol. 2, p. 711, Ls. 2-6.) For the first time on appeal Folk contends this argument improperly "ask[ed] the jury to infer facts which [the prosecutor] knew to be false." (Appellant's brief, p. 51.) Because the only "fact" the prosecutor mentioned or implied in his argument was that Folk did not ask Blair any questions in cross-examination about his testimony that Folk had expressed a desire to sexually abuse children, a fact that is true, Folk has shown no fundamental error.

B. Standard Of Review

"[T]he standard of review governing claims of prosecutorial misconduct depends on whether the defendant objected to the misconduct at trial." State v. Severson, 147 Idaho 694, 715, 215 P.3d 414, 435 (2009). If a defendant fails to timely object at trial to allegedly improper closing arguments by the prosecutor, the conviction will be set aside for prosecutorial misconduct only upon a showing by the defendant that the alleged misconduct rises to the level of fundamental error. State v. Perry, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010). To show fundamental error:

> (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

Id. at 226, 245 P.3d at 978 (footnote omitted).

C. Folk Has Failed To Show Error, Much Less Fundamental Error

"It is well settled that both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom." State v. Eldred, 148 Idaho 317, 323, 222 P.3d 1011, 1017 (Ct. App. 2009). This includes comment on "the failure … to introduce material evidence or to call logical witnesses." State v. Hodges, 105 Idaho 588, 592, 671 P.2d 1051, 1055 (1983). See also State v. Moses, 156 Idaho 855, 873,

332 P.3d 767, 785 (2014) (prosecutor may generally comment on the "lack" of defense evidence). Pointing out that Folk did not cross-examine Blair regarding his testimony that Folk had expressed a desire to sexually abuse children, despite extensive cross-examination about other aspects of Blair's testimony (Tr., vol. 2, p. 710, L. 20 – p. 711, L. 6), was proper argument. Folk has shown no error, much less error that is plain on the record and prejudicial.

Folk argues that the prosecutor "ask[ed] the jury to infer facts which he knew to be false." (Appellant's brief, p. 51.) Specifically Folk claims that the prosecutor knew there was evidence that would have impeached Blair but that Folk could not present it without alerting the jury to the fact he had sexually abused children in the past. (Appellant's brief, p. 52.) This argument is unsupported by the record.

The evidence Folk claims for the first time on appeal would have impeached Blair comes from a transcript of an interview of Blair by Detective Galbreaith. In the interview Blair told Detective Galbreaith that Folk had "left the state" after Christmas (the date of the crime at issue) "[b]ecause he knows that he did wrong." (Aug., p. 5 (Tr., p. 1, L. 22 – p. 2, L. 21).) Folk came back around New Year's Day to get his bike. (Aug., p. 6 (Tr., p. 6, L. 6 – p. 7, L. 2).) At that time he told Blair that Blair would miss him, gave him a hug, and "said goodbye." (Aug., p. 6 (Tr., p. 6, L. 18 – p. 7, L. 12).) He also told Blair that "he was quit anyway," meaning that he was "going to quit having contact with children." (Aug., p. 6 (Tr., p. 7, Ls. 10-16).) Detective Galbreaith asked Blair when Folk said that and Blair answered, "He told me that several times." (Aug., p. 6 (Tr., p. 7, Ls. 17-

19).) Blair then told Detective Galbreaith that Folk "also said he was going to go to Africa." (Aug., p. 6 (Tr., p. 7, Ls. 21-22).)

Folk's claim that this interview makes it clear on the record that the prosecutor knowingly misrepresented facts is specious. First, the statement in the interview that Folk told him *after the alleged crime* that he was "quit" of having contact with minors does not in any way impeach Blair's testimony that Folk expressed a desire to sexually abuse minors. Even if Folk had *at a relevant time* told Blair that he was "quit" such does not actually in any way disprove that he also said that he did not want to quit sexually abusing children. At best this evidence would show that Folk made contradictory statements about his intent and at worst it would show that he expressed the intent to *stop* molesting children only after the crime charged in this case.

Second, even if Blair's statements to Detective Galbreaith could conceivably have been used to impeach his testimony there is no good faith basis for Folk's appellate counsel's claim that the prosecutor "knew" the facts in his argument to be false. Indeed, if the transcript of Blair's statements to Detective Galbreaith can be superficially said to impeach Blair's trial testimony, it was entirely proper to comment on "the failure … to introduce material evidence or to call logical witnesses." Hodges, 105 Idaho at 592, 671 P.2d at 1055. Indeed, Folk's decision to not attempt to impeach Blair on this one point of Blair's testimony could easily have been because Blair would have testified that *before* the charged crime Folk expressed a desire to sexually abuse children, but after the charged crime he fled the state because he had "done wrong" and was "quit"

of sexually abusing children. The prosecutor's argument pointing out that, despite extensive cross-examination on other points of the testimony, Folk had not cross-examined Blair about his testimony regarding Folk's statement was proper argument and Folk has failed to show constitutional, clear, and prejudicial error.

VII.
Folk Has Failed To Show Fundamental Error In The Prosecutor's Rebuttal To Folk's Argument Regarding Why He Did Not Want To Be Cross-Examined

A. Introduction

During closing arguments, Folk argued why he did not want to be cross-examined as follows:

> Now you may recall that I did not testify. So I wrote this letter out so that I could expound on that without losing my thoughts. Because I'm not trained in any way.
>
> You may have noticed that I did not testify this time. I have testified before.
>
> MR. DEWEY Objection. Your Honor. I don't think this is proper argument in any sort of way.
>
> THE COURT Well so far I don't find it improper inasmuch as the state's already produced evidence that he testified before. So I don't think he has said anything so far the jury doesn't know. But I'm listening very intently to make sure he stays within the bounds of the law.
>
> DEFENDANT FOLK: Thank you.
>
> It is a horror to be charged with a crime and to be innocent. If I protest too much I will be seen as guilty. If I get angry I will be seen as guilty. If I forget a fact under the heat of interrogation I may be seen as guilty.
>
> People often do not believe the accused who testifies because they think that he may not only be guilty of a crime but he may take the

> oath and lie under oath to escape conviction. Nothing I say on the witness stand can ever acquit me.
>
> I stand before you now as pleading not guilty. Taking the stand allows the prosecutor to make the most innocent person look guilty. And anyway the state has failed to prove its case. They cannot prove what was not in my mind any more than the state can prove what was in my mind.

(Tr., vol. 2, p. 732, L. 24 – p. 734, L. 4.) In rebuttal the prosecution argued:

> Ladies and gentlemen Mr. Folk doesn't want to be found guilty. And he didn't want to be cross-examined. He didn't want an attorney asking him questions. The victim of this crime didn't get that luxury. And he stood -- he sat here and he was cross-examined for hours about what had happened. He's not the one who's alleged to have done something wrong.

(Tr., vol. 2, p. 735, Ls. 5-11.) The judge later instructed the jury:

> One thing that I feel legally bound to address at this time just to remind the jury -- I wouldn't normally do this but at the beginning of Mr. Dewey's rebuttal he did mention that the defendant didn't want to be cross-examined by the prosecutor. I understand why he made that comment. Certainly it's a response to something that was said by the defendant himself in his closing argument.
>
> But I do need to remind the jury that it's important that you consider and remember instruction 14-A. And 14-A says that you must not draw any inference of guilt from the fact that the defendant has not testified nor should this fact be discussed by you or enter into your deliberations in any way.
>
> Those are things that we don't talk about and probably shouldn't have been brought up. So please disregard any comment to the defendant's failure to testify.

(Tr., vol. 2, p. 740, Ls. 5-22.) Instruction 14-A instructed the jury to not draw any inference of guilt from the fact the defendant did not testify and to not discuss that fact in deliberations. (R., p. 747.)

For the first time on appeal, Folk contends the prosecutor's argument was fundamental error because it infringed on his right to silence, impermissibly

commented on his right to confront the witness, and potentially aroused sympathy for the victim. (Appellant's brief, pp. 52-55.) Application of the relevant law, however, shows Folk has failed to carry his appellate burden of showing fundamental error.

B. Standard Of Review

To prevail on a claim of fundamental error a defendant must demonstrate (1) violation of an unwaived constitutional right; (2) that the error is clear or obvious and lack of objection was not tactical; and (3) prejudice. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010).

C. Folk Has Failed To Show Fundamental Error Where The Prosecutor Addressed A Topic (Why Folk Did Not Want To Be Cross-Examined) Raised By Folk In His Argument

"Direct and indirect comments on the defendant's failure to testify at trial are forbidden. The rule, however, does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses." State v. Mendoza, 151 Idaho 623, 627, 262 P.3d 266, 270 (Ct. App. 2011) (internal quotations omitted). Although the prosecution may not use a defendant's silence to create an inference of guilt, evidence of invocation of that right may be admissible to rebut factual assertions by the defendant. See, e.g., Doyle v. Ohio, 426 U.S. 610, 620 n.11 (1976); State v. Dougherty, 142 Idaho 1, 5, 121 P.3d 416, 420 (Ct. App. 2005) ("Under this exception, the defendants [sic] silence is admissible only for the limited purpose of rebutting the impression created by the defendant. The prosecution may not

argue that the defendant's silence is inconsistent with his or her claims of innocence." (citation omitted)).

Folk has failed to show that his right was violated, much less that such a violation is clear in the record. The prosecutor did not argue that an inference of guilt could be drawn from Folk's decision to not testify. Rather, the prosecutor rebutted Folk's argument that he avoided being cross-examined by the prosecutor because such cross-examination can "make the most innocent person look guilty" by pointing out that Folk made extensive use of cross-examination when the victim testified. As found by the district court, the prosecutor's argument was in response to Folk's argument. (Tr., vol. 2, p. 740, Ls. 5-12.) The prosecutor did not ask the jury to draw an inference of guilt, but rather rebutted Folk's argument by pointing out to the jury that his claim that cross-examination was a means not to achieve truth but instead to make the innocent appear guilty was hypocritical and without merit.

Nor has Folk met his burden of showing prejudice. Immediately after the closing arguments the district court instructed the jury that it was not to draw any inferences of guilt from Folk's decision to not testify. (Tr., vol. 2, p. 740, Ls. 5-22; R., p. 747.) Jurors are presumed to have followed the court's instructions. See State v. Dunlap, 155 Idaho 345, 369, 313 P.3d 1, 25 (2013). To the extent the prosecutor's rebuttal could be interpreted as requesting the jury to draw an inference of guilt prejudice has not been shown because the district court instructed them to draw a different inference (or no inference at all).

D. Folk's Claim The Prosecutor's Rebuttal Was Fundamental Error For Infringing On His Right To Confrontation Or Engendering Sympathy Is Without Merit

The prosecutor argued, in response to Folk's argument that he did not testify because he believed cross-examination would be employed to make him appear guilty, that the victim did not get the "luxury" of avoiding cross-examination and that "he sat here and he was cross-examined for hours about what had happened." (Tr., vol. 2, p. 735, Ls. 5-11.) As set forth above, the state submits that *as a response to Folk's argument*, the prosecutor's argument comparing and contrasting Folk's statement that he believed his own cross-examination would have made him appear guilty with his actions in cross-examining the victim did not rise to error. Nor was the language used by the prosecutor, who merely made the factual statement that the cross-examination lasted for hours, inflammatory such that it would engender prejudicial sympathy. More importantly, however, Folk has failed to demonstrate that the claimed error was clear, constitutional, and prejudicial.

In support of his argument for fundamental error Folk relies upon State v. Willard, 761 N.E.2d 688, 694 (Ohio App. 2001), which indicates that a statement that the victim had to "endure" cross-examination was "improper." As support for that conclusion the Ohio Court cited Burns v. Gammon, 173 F.3d 1089, 1095 (8th Cir. 1999). Id. In that case, however, the Eighth Circuit held that such an argument did not amount to plain error. Burns, 173 F.3d at 1095. Folk has failed to cite any authority that a comment on the victim having to undergo cross-examination, even if error, rose to the level of being clear, constitutional error.

Finally, Folk has failed to show that merely pointing out that cross-examination of the victim lasted for hours (without claiming the victim had to "endure" cross examination, Willard, 761 N.E.2d at 694, and without making a "sarcastic statement" that invited the jury "to punish [defendant] for making the victim of the crime go through the ordeal of cross-examination," Burns, 173 F.3d at 1095, prejudiced him. Even if mentioning the length of cross-examination (a fact the jurors witnessed in person) could be considered prejudicial, there is no reason to believe that it was so prejudicial as to change the outcome of the trial. Folk has failed to show any prong of fundamental error, much less all three.

VIII.
Folk Has Failed To Show Cumulative Error

"The cumulative error doctrine applies when there are multiple irregularities at trial." State v. Ehrlick, 158 Idaho 900, 931, 354 P.3d 462, 493 (2015). "A necessary predicate to the application of the doctrine is a finding of more than one error." State v. Abdullah, 158 Idaho 386, 449, 348 P.3d 1, 64 (2015) (internal quotes and brackets omitted). "The presence of errors alone, however, does not require the reversal of a conviction." State v. Shackelford, 150 Idaho 355, 386, 247 P.3d 582, 613 (2010). This is so because "under due process a defendant is entitled to a fair trial, not an error-free trial." State v. Moore, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing Bruton v. United States, 391 U.S. 123, 135 (1968)). "[I]t is well-established that alleged errors at trial, that are not followed by a contemporaneous objection, will not be considered under the cumulative error doctrine unless said errors are found to

pass the threshold analysis under our fundamental error doctrine." State v. Perry, 150 Idaho 209, 230, 245 P.3d 961, 982 (2010).

As set forth above, Folk has failed to show multiple errors to cumulate. To the extent he has shown error, such errors continue to be harmless. Folk has failed to show that he did not receive a fair trial.

CONCLUSION

The state respectfully requests this Court to affirm Folk's conviction.

DATED this 11th day of January, 2017.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11th day of January, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

MAYA P. WALDRON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd